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The Texas Series LLC Turns 10: A Series of Remaining Questions and Updates on the New Uniform Protected Series Act and Changes in Delaware

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I. Introduction.

In 2009, Texas enacted legislation for the series limited liability company. To date, 18 US States have provided legislation for series limited liability companies in some shape or form as have Puerto Rico and the District of Columbia, albeit with some significant variance from one state to another. California recognizes the registration of foreign series LLCs, but does not have its own statute allowing for the creation of a California series.

Historians differ on the impetus behind the series. Some attribute the series' origin to business trusts, but most seem to agree that the concept arose domestically from the investment world and the desire to segregate investment portfolios with different assets or investments and different beneficiaries within one legal entity.

In these structures, a mutual fund would use multiple "series" with different shareholders which in turn would be treated as independent companies for the purposes of the Investment Company Act of 1940 (even though the entity structure was not itself divided into separate recognized divisions for state law purposes).[1] This allowed investment funds to achieve some costs savings while harmonizing management. The purported advantages of a series almost always revolve around cost and flexibility and, in some states – such as Illinois – the costs associated with filing new or multiple entities makes a compelling argument for using a series.

[1] 15 U.S. Code § 80a–51; Securities and Exchange Commission IM Guidance Update No. 2014-06.

In 2017, as additionally discussed in the remainder of this article, the National Conference of Commissioners on Uniform State Laws published the long-awaited Uniform Protected Series Act ("UPSA"). To date, the UPSA has been adopted by Arkansas, Nebraska, and Virginia with legislation for its adoption also being introduced in Tennessee, Connecticut and Iowa. As a result, we may see increased adoption of the series nationwide, which may in turn resolve some of the questions on their use discussed below. Further, the USPA may inform further changes to existing series law.

The USPA also introduces some standardized nomenclature for each individual series of a series limited liability company ("SLLC") as a "protected series," which the author finds useful for the sake of clarity and which will be used in the remainder of this article with the understanding that the Texas Business Organization Code has not incorporated the use of these terms. As additionally discussed below, Delaware has now adopted the "protected series" terminology, albeit with a slight distinction from the UPSA.

But what *is* a protected series, exactly, and how is it different from a traditional entity? Some practitioners have asked this question from the outset of series legislation, and yet there doesn't seem to be a uniform answer in the years since Delaware adopted the first series statute.[2]

[2] In the United States. An analogous entity to the series limited liability company known as a "protected cell" company arose at almost the exact same time in the self-governing British Protectorate of Guernsey and is also permitted in Bermuda, Barbados, Gibraltar, Malta, and the Isle of Man.

As lawyers get more creative in the use of series (especially where protected series operate active businesses as opposed to holding investments somewhat passively), it's worth remembering this fundamental question. As explained below, there remain key differences between the rights afforded to protected series and true standalone entities, at least under current Texas law.

Since series LLCs have come to fruition in Texas, the author has found that practitioners are using series for various applications that occasionally seem to stretch the limits of where a series fits best under current Texas law. The author is aware of some rather complex series LLC structures operating in highly regulated industries such as healthcare, seemingly without issue thus far. Other practitioners have demonstrated unique uses for series LLCs to obtain advantages in areas such as oil and gas.

Regardless, given the lack of Texas case law clarifying the full limits of series and what the author views as remaining ambiguities, the author proposes that the basic idea that led to the creation of the series – allowing for the management of different assets under one umbrella, often with the same or similar management and membership – should continue to serve as a guide for practitioners examining the use of series companies today. However, practitioners should be careful about other aspects of Texas law that interact with business entities and which have not been separately modified to incorporate series. In the author's view, this is particularly true given the propensity of Texas courts to lean towards a "strict" interpretation of Texas statutes.

In the course of exploring the limits of series LLCs, the author has compiled information regarding other areas of law that may not perfectly interact with the SLLC format, which may limit the series in application, or which should at least cause a practitioner to question whether a series might be the best fit for the matter. This is not intended to be a comprehensive list of potential challenges when using a series, but is meant to spur analysis prior to the use of a series LLC. The focus of this analysis is on Texas law, although this article also explores the UPSA and changes to Delaware law to briefly update the reader on those laws and briefly ask whether those approaches bring any solutions to the table.

Lastly, the reader may disagree with some of the author's interpretations or positions and, in part, that's the point – reasonable minds *could* disagree over how series function under current Texas law.

II. Potential Questions and <u>Interaction with Other Laws</u>

A. The Person and Membership Question.

With the exception of Illinois (which allows a protected series to be treated as a separate entity to the extent set forth in the articles of organization of the SLLC),[3] most states have implemented laws that treat protected series as a sort of hybrid between a legal person and a distinct entity. In the majority of states with series legislation, a protected series is typically granted the general right to sue and be sued, enter contracts, hold title to assets, and incur liabilities separate from other protected series or the SLLC, all while

[3] 805 ILCS 180/37-40(b)

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